



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Matthew G. Whitaker, Executive Director  
Foundation for Accountability & Civic Trust  
Suite 900  
1717 K Street, NW  
Washington, DC 20006

**NOV 22 2017**

RE: MURs 7169, 7170, 7171, 7172, 7173, 7174,  
7175, 7176, 7177, 7178, 7179, 7182, 7187, 7188  
DCCC, *et al.*

Dear Mr. Whitaker:

On November 16, 2017, the Federal Election Commission reviewed the allegations in your above-numbered complaints dated October 24, 2016, and October 31, 2016, and found that on the basis of the information provided in your complaints, and information provided by Respondents, there is no reason to believe the Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions as a result of improperly allocating the costs of the advertisements at issue, and no reason to believe the following Respondents violated 52 U.S.C. § 30116(f) by accepting excessive in-kind contributions as a result of improperly allocating the costs of the advertisements: Santarsiero for Congress and Lora Haggard in her official capacity as treasurer; Ruben Kihuen for Congress and Jay Petterson in his official capacity as treasurer; Nelson for Wisconsin and Dr. Beth Gillis in her official capacity as treasurer; Colleen Deacon for Congress and Jennifer May in her official capacity as treasurer; Applegate for Congress and Douglas Applegate in his official capacity as treasurer; Mowrer for Iowa and Dennis Skinner in his official capacity as treasurer; Texans for Pete and Wayne Alexander in his official capacity as treasurer; Suzanna Shkreli for Congress and Jennifer May in her official capacity as treasurer; Carroll for Colorado and Mitchell S. Wright in his official capacity as treasurer; Eggman for Congress and Jay Petterson in his official capacity as treasurer; Stephanie Murray for Congress and Jennifer May in her official capacity as treasurer; Bryan Caforio for Congress and Gonzalo Freixes in his official capacity as treasurer; Friends of Christina M. Hartman and Diane Topakian in her official capacity as treasurer; and LuAnn Bennett for Congress and Jennifer May in her official capacity as treasurer. The Commission further found no reason to believe that the Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer violated 52 U.S.C. § 30116(a) and no reason to believe Hillary for America and Jose Villarreal in his official capacity as treasurer violated 52 U.S.C. § 30116(f) in connection with the coordinated communication allegation. Last, the

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Commission found no reason to believe the Colorado Democratic Party and Judith Steinberg in her official capacity as treasurer violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions as a result of improperly allocating the costs of the advertisements or in connection with the coordinated communication allegation. Accordingly, the Commission closed its files in these matters.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 52 U.S.C. § 30109(a)(8).

Sincerely,

Lisa J. Stevenson  
Acting General Counsel



BY: Mark Allen  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

UNCLASSIFIED



1 **I. INTRODUCTION**

2  
3 These matters involve 15 television advertisements aired during the 2016 election that  
4 referenced then-presidential candidate Donald Trump and one of fourteen Republican  
5 congressional candidates. Each advertisement was paid for partially by the Democratic  
6 Congressional Campaign Committee (“DCCC”) (and in one matter, the Colorado Democratic  
7 Party (“CDP”)) and partially by the campaign committee of the respective Democratic  
8 congressional candidate that the advertisement supported. Each advertisement also featured that  
9 Democratic congressional candidate. The Complaints allege that the Respondents violated the  
10 Federal Election Campaign Act of 1971, as amended (the “Act”), by allocating the cost of the  
11 advertisements, resulting in excessive contributions from the DCCC/CDP to the candidate  
12 committees. The Respondents assert in response that the costs for these advertisements were  
13 properly allocated.

14 The Complaints further allege that the advertisements were coordinated between the  
15 DCCC/CDP and Hillary for America (“HFA”), the principal campaign committee for Hillary  
16 Clinton in the 2016 presidential election, resulting in excessive in-kind contributions from  
17 DCCC and CDP to HFA. Respondents deny coordinating as alleged.

18 The information in the record does not support the allegations that the costs for these  
19 advertisements were incorrectly allocated or that DCCC/CDP coordinated with HFA. The  
20 Commission therefore finds no reason to believe that the DCCC or the CDP made excessive in-  
21 kind contributions to the candidate committees.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Allocation of the Costs of the Advertisements**

3 The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of  
4 money or anything of value made by any person for the purpose of influencing any election for  
5 Federal office.”<sup>1</sup> The term “anything of value” includes all in-kind contributions.<sup>2</sup> Contributions  
6 from a national or state committee to a candidate committee are limited to a total of \$5,000 per  
7 election, and candidates and political committees are prohibited from knowingly accepting  
8 contributions in excess of the Act’s limits.<sup>3</sup> The Act grants the national and state committees of  
9 a political party authority to also support their general election candidates with coordinated  
10 expenditures subject to certain limits.<sup>4</sup> Political party committees may support their candidates  
11 with independent expenditures, defined as expenditures that expressly advocate the election or  
12 defeat of a clearly identified federal candidate and are not made in concert or cooperation with or  
13 at the request or suggestion of such candidate, the candidate’s authorized political committee, or  
14 their agents.<sup>5</sup>

15 Commission regulations provide that “[e]xpenditures, including in-kind contributions,  
16 independent expenditures, and coordinated expenditures made on behalf of more than one clearly  
17 identified Federal candidate shall be attributed to each such candidate according to the benefit  
18 reasonably expected to be derived.”<sup>6</sup> If either side pays for amounts that exceed their allocated

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1 52 U.S.C. § 30101(8)(A).

2 11 C.F.R. § 100.52(d)(1).

3 52 U.S.C. § 30116(a)(2)(A), (f).

4 52 U.S.C. § 30116(d).

5 52 U.S.C. § 30101(17); 11 C.F.R. § 109.30. *See Colorado Rep. Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996). *See also* 11 C.F.R. § 100.22.

6 11 C.F.R. § 106.1(a).

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1 share of the total costs, then those excessive amounts are in-kind contributions to the other  
2 candidate(s) involved. For broadcast communications, the attribution is determined by the  
3 proportion of space or time devoted to each candidate as compared to the total space or time  
4 devoted to all candidates.<sup>7</sup>

5 The Respondents assert that each of the fifteen advertisements in these matters clearly  
6 identifies a Democratic candidate for Congress, and either expressly advocates against the  
7 candidate's Republican opponent and Trump, or addresses the Republican opponent's support of  
8 Trump. Complainant alleges that the DCCC and CDP made, and the Respondent Democratic  
9 congressional candidate committees accepted, excessive contributions in connection with the  
10 advertisements. Complainant argues that it was improper for the Respondents to allocate the  
11 costs of the advertisements and, therefore, the amounts the DCCC paid in connection with each  
12 advertisement were excessive, in-kind contributions to the respective individual candidate  
13 committee.<sup>8</sup>

14 Respondents assert in response to the Complaints that the methods used to allocate the  
15 costs from the ads were appropriate and that the resulting expenditures were reported correctly.  
16 Specifically, Respondents assert that they applied the allocation method for broadcast  
17 communications set forth in Section 106.1(a) of the Commission's regulations and allocated the  
18 costs according to the space and time devoted to each entity as compared to the total space or

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<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g.*, MUR 7169 (Santarsiero), Compl. at 9. The Complaints discuss at length the Commission's treatment of hybrid ads. *See, e.g.*, MUR 7169, Compl. at 4-9. The Complaints note that the advertisements at issue here are not "hybrid communications" and that Respondents are improperly substituting the standard "generic party reference" with material attacking Donald Trump, while still attributing a portion of the cost of the advertisements to the DCCC/CDP. *See id.* at 2-4. Hybrid ads are defined as "'communications that refer both to one or more clearly identified Federal candidates and generically to candidates of a political party.'" *See id.* at 3 quoting Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569, 26,770 (May 10, 2007). There are no generic references, such as "Democrats" or "Republicans," in any of the 15 ads at issue here.

1 time devoted to all candidates.<sup>9</sup> According to Respondents, the costs of the advertisements  
2 identified in the Complaints were allocated between the DCCC or CDP and the Democratic  
3 candidate whose opponent was featured in the ad along with Donald Trump, pursuant to a  
4 time/space basis according to the portion of the ad that concerned each candidate.<sup>10</sup> The portion  
5 of each ad that addressed Trump was paid for by the DCCC.<sup>11</sup> The portion of each ad that  
6 addressed the Republican congressional candidate was either paid for in full by the  
7 corresponding Democratic congressional candidate or split between that Democratic candidate  
8 and the DCCC spending under its coordinated party expenditure limit.<sup>12</sup>

9 For example, Respondents assert that they paid for the advertisement at issue in MUR  
10 7170 (Kihuen) as an independent expenditure by the DCCC for the portion of the ad expressly  
11 advocating against Trump and as an expenditure by Ruben Kihuen for Congress, the principal  
12 campaign committee for Kihuen's campaign for Nevada's 4th Congressional District, because a  
13 portion of the ad advocated against the election of Kihuen's opponent.<sup>13</sup> This advertisement,  
14 "Our Values" (0:30), contained the following audio:

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<sup>9</sup> Resp. of DCCC, Santarsiero for Congress, Ruben Kihuen for Congress, Nelson for Wisconsin, Colleen Deacon for Congress, Applegate for Congress, Mowrer for Iowa, Texans for Pctc, Suzanna Shkreli for Congress, Eggman for Congress, Stephanie Murray for Congress, Bryan Caforio for Congress, Friends of Christina M. Hartman, and LuAnn Bennett for Congress ("Joint Resp.") at 5-13 (Dec. 22, 2016). This Joint Response applied to all fourteen Complaints at issue in this report. *See id.*

<sup>10</sup> Joint Resp. at 4-5. The available record indicates that the subject advertisements aired during September and October 2016. The Joint Response indicates that the cost for the portion of each broadcast that was dedicated to the required disclaimer was split between the candidate and DCCC using the same ratio applied to the rest of the advertisement. *Id.* at 5-6.

<sup>11</sup> Joint Resp. at 4-5. The Respondents assert that this portion was reported by the DCCC as either an independent expenditure if it expressly advocated against Trump or an operating expenditure if it did not. *See id.* *See generally* 11 C.F.R. § 100.22.

<sup>12</sup> Joint Resp. at 4-5.

<sup>13</sup> *See id.* Respondents allocated the payments in this manner for the advertisements at issue in MURs 7169 (Santarsiero), 7170 (Kihuen), 7171 (Nelson), 7174 (Mowrer), 7176 (Shkreli), and 7182 (Caforio).

1                   *Voiceover*: Donald Trump has made a lot of insulting  
2 statements. [Footage of Trump].

3  
4                   *Trump*: "Ah. I don't know what I said. Ah." [Footage of  
5 Trump].

6  
7                   *Trump*: "He's a Mexican." [Footage of Trump].

8  
9                   *Voiceover*: Trump insulted immigrants, women, a military  
10 family and veterans with PTSD. [Footage of Trump beside  
11 "examples," such as Khizr Khan].

12  
13                   *Kihuen*: "My opponent Crescent Hardy says he'll do anything  
14 to help Donald Trump, and Hardy also stands with Cliven  
15 Bundy." [Footage of Kihuen, Trump, and Hardy].

16  
17                   *Bundy*: "And I've often wondered . . . are they better off as  
18 slaves, picking cotton?" [Footage of Kihuen and Bundy].

19  
20                   *Kihuen*: "Yeah, that guy." [Footage of Kihuen and Bundy].

21  
22                   *Kihuen*: "I'm Ruben Kihuen and I approve this message, because  
23 these are not our values, and we're better off without Crescent  
24 Hardy and Donald Trump." [Footage of Kihuen].<sup>14</sup>

25  
26                   In other instances, according to Respondents, the portion of an advertisement paid for by  
27 the DCCC (under the allocation principles discussed above, because it addressed Trump) was  
28 reported as an operating expenditure by the DCCC because that portion of the ad did not  
29 expressly advocate Trump's defeat, but instead focused on policy issues.<sup>15</sup> For example, the  
30 Respondents assert that the ad in MUR 7172 (Deacon) was paid for by the DCCC in that manner  
31 in part and in part as an expenditure by Colleen Deacon for Congress, the principal campaign  
32 committee for Colleen Deacon's campaign for New York's 24th Congressional District because

<sup>14</sup> See "Our Values," available at <https://www.youtube.com/watch?v=ulkmwN7ivMU> (Oct. 17, 2016).

<sup>15</sup> Joint Resp. at 4-5. Respondents allocated the payments in this manner for the advertisements at issue in MURs 7172 (Deacon), 7175 (Gallego), 7178 (Eggman), 7179 (Murphy), and 7188 (Bennett).

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1 a portion of the ad addressed Deacon's opponent's support for Trump. This advertisement,  
2 "Unsettled" (0:30), contained the following audio:

3 *Voiceover:* In an unsettled world, John Katko and Donald  
4 Trump's approach takes us down a dangerous path. [Footage of  
5 current events].

6  
7 *Trump:* "I love war in a certain way." [Footage of Trump].

8  
9 *Voiceover:* But when asked about supporting Trump, Katko  
10 said "I absolutely will support." [Footage of Katko].

11  
12 *Trump:* "Tell them to go [bleep] themselves." [Footage of  
13 Trump].

14  
15 *Voiceover:* When national security leaders condemn Trump's  
16 reckless statements on foreign policy. [Footage of Trump].

17  
18 *Reporter:* "People are wondering how those things can happen  
19 and you not flat out denounce it." [Footage of Katko and  
20 reporter].

21  
22 *Katko:* "I'm more concerned about my race." [Footage of  
23 Katko].

24  
25 *Voiceover:* Not about the safety of our families. [Footage of  
26 Katko].

27  
28 *Voiceover:* Trump and Katko put our National Security at risk.  
29 [Footage of Trump and Katko].

30  
31 *Deacon:* "I'm Collen Deacon and I approve this message."  
32 [Footage of Deacon].<sup>16</sup>

33  
34 The one matter involving the CDP, MUR 7177 (Carroll), involves an advertisement paid  
35 for by the CDP and Carroll for Colorado, the principal campaign committee for Morgan  
36 Carroll's congressional campaign for Colorado's 6th Congressional District.<sup>17</sup> The CDP paid for

<sup>16</sup> See "Unsettled," available at <https://www.youtube.com/watch?v=Ch4ToJp3Br0> (Oct. 8, 2016).

<sup>17</sup> MUR 7177 (Carroll), Compl. at 1 (Oct. 31, 2016).



1 advocated.<sup>23</sup> Here, Respondents assert that certain portions of the advertisements relating to  
2 Trump do not contain express advocacy,<sup>24</sup> and the Commission has not expressly addressed  
3 allocation of costs for communications that address multiple candidates but may not expressly  
4 advocate for each candidate.<sup>25</sup> The Commission has also approved of these Section 106.1  
5 allocation principles when an advertisement not only addresses two candidates, but is also paid  
6 for by two separate parties.<sup>26</sup>

7 The Commission has not explicitly addressed the allocation of costs of communications  
8 that address multiple candidates but do not expressly advocate the election or defeat of those  
9 candidates. However, Section 106.1(a) applies to “expenditures” – covering the DCCC and  
10 candidate committee payments for any non-express advocacy ads – as well as to independent  
11 expenditures, and the allocation method used by Respondents appears to satisfy the time and  
12 space basis set forth in the regulation.<sup>27</sup>

13 Based on the available record, it appears that the Respondents’ allocation of the costs of  
14 the ads between the Democratic House campaign committees and either DCCC or CDP is  
15 consistent with Section 106.1(a) and Commission precedent. The Complaints do not provide  
16 information suggesting otherwise. Accordingly, the Commission finds no reason to believe that  
17 the DCCC and CDP violated 52 U.S.C. § 30116(a) by making, or that the Democratic House

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<sup>23</sup> *Id.*

<sup>24</sup> We do not analyze in this report whether Respondents have properly characterized the content of each advertisement.

<sup>25</sup> *Id.* at n. 5.

<sup>26</sup> See Adv. Op. 2007-24 (Burkee/Walz) at 5 (requiring the costs of joint ad devoting equal time and space between two candidates to be split equally between those two candidates’ committees). See also Adv. Op. 2004-37 (Waters) (describing payments by multiple candidates for brochure, under 106.1 allocation principles).

<sup>27</sup> Respondents assert that in attributing the cost of a communication among multiple candidates, the Commission does not look to whether or not the segment associated with a particular candidate contains express advocacy. See Joint Resp. at 6.

1 campaign committees violated 52 U.S.C. § 30116(f) by receiving, excessive contributions as a  
2 result of improperly allocating the costs of the ads.

3 **B. Coordination**

4 The Complaints also allege that the DCCC and CDP coordinated their advertisements  
5 with HFA. Respondents deny these allegations.

6 Under the Act, expenditures that are coordinated with a candidate are treated as  
7 contributions to the candidate.<sup>28</sup> The Commission regulations further provide that a payment for  
8 a communication “coordinated with a candidate, a candidate’s authorized committee, or an agent  
9 of either of the foregoing” must be treated as either an in-kind contribution to, or coordinated  
10 party expenditure with, the candidate.<sup>29</sup> To determine whether a communication constitutes a  
11 “party coordinated communication,” Commission regulations apply a three-prong test.<sup>30</sup> First,  
12 the communication must be paid for by a political party committee or its agent.<sup>31</sup> Second, the  
13 communication must satisfy one of three content standards.<sup>32</sup> Finally, the communication must  
14 satisfy one of six conduct standards.<sup>33</sup>

<sup>28</sup> 52 U.S.C. § 30116(a)(7)(B).

<sup>29</sup> 11 C.F.R. § 109.37(a), (b).

<sup>30</sup> 11 C.F.R. § 109.37(a)(1),(2),(3).

<sup>31</sup> 11 C.F.R. § 109.37(a)(1).

<sup>32</sup> The content standards are: (1) a public communication that disseminates, distributes, or republishes, in whole or in part, a candidate’s campaign materials; (2) a public communication containing express advocacy; and (3) a public communication that refers to a clearly identified Federal candidate that is publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.37(a)(2)(i),(ii),(iii).

<sup>33</sup> The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign’s plans, projects, activities or needs,

1 In these matters, the payment prong of the coordinated communication test is satisfied  
2 because the DCCC and CDP paid for, in part, the ads at issue. The content prong also appears to  
3 be satisfied because the ads are either public communications containing express advocacy, or  
4 public communications that clearly refer to a federal candidate and were publicly distributed or  
5 disseminated in that candidate's jurisdiction within 90 days of a general election.<sup>34</sup>

6 However, the Complaints do not allege specific facts that are sufficient to provide reason  
7 to believe that the conduct prong has been satisfied. In fact, the Complaints offer only that there  
8 is "close and ongoing coordination between the DCCC and HFA," and the Commission sees no  
9 basis on the current record to conclude or reasonably infer that any of the types of conduct  
10 described in the conduct prong have been satisfied.

11 Moreover, the Complaints' broad allegations of coordination between the DCCC and  
12 HFA or the CDP and HFA are sufficiently rebutted by the specific sworn responses denying the  
13 alleged coordination. The DCCC's Response provides a declaration from its Deputy Executive  
14 Director, Michael Ian Russell, who worked on and supervised DCCC employees working on the  
15 advertisements mentioning Trump.<sup>35</sup> According to Russell, during 2016 he did not work for  
16 HFA in any capacity, and no DCCC employee or House campaign staff working on these  
17 advertisements was employed by HFA at any time during the 120 day period prior to the date  
18 each ad was created.<sup>36</sup> Russell avers that the program of advertisements was conceived by  
19 DCCC without the request, suggestion, or assent of HFA or its agents, that staff were instructed

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or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material under circumstances that satisfy one of the first five criteria identified here. 11 C.F.R. § 109.37(a)(3); *see also* § 109.21(d)(1)-(6).

<sup>34</sup> See 11 C.F.R. § 109.37(a)(2)(ii), (iii).

<sup>35</sup> Joint Resp., Ex. A.

<sup>36</sup> Russell Decl. ¶¶ 1, 9.

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1 not to discuss any aspect of the advertisements with HFA, and that he is not aware of any breach  
2 of protocol.<sup>37</sup> He further avers that none of the advertisements were created, produced, or  
3 distributed at the request or suggestion of HFA nor did they assent to the creation, production, or  
4 distribution of the advertisements, and that HFA had no involvement with the DCCC or any of  
5 the House campaign staff regarding the content, production, or distribution of the  
6 advertisements.<sup>38</sup> Last, he avers that HFA did not convey any relevant information about its  
7 plans, projects, activities, or needs concerning any advertisement.<sup>39</sup>

8 Similarly, the CDP Response denies coordination and supplies a declaration from its  
9 Chairman, Rick Palacio, averring that the advertisement in MUR 7177 was not created,  
10 produced, or distributed at the request, suggestion, or assent of HFA, and that HFA was not  
11 materially involved in – nor were there substantial discussions between HFA and CDP –  
12 regarding the creation, production, or distribution of the advertisement.<sup>40</sup>

13 HFA, for its part, denies that it or any of its agents coordinated any of the advertisements  
14 with either the DCCC or the CDP, or their agents.<sup>41</sup>

15 In sum, the lack of available information indicating the sharing of campaign information,  
16 the lack of specific facts in the Complaint, combined with the denials of any coordinating  
17 activity, do not provide a sufficient predicate to investigate whether any conduct standard is

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<sup>37</sup> *Id.* ¶¶ 3 - 6.

<sup>38</sup> *Id.* ¶ 7.

<sup>39</sup> *Id.* ¶ 8. In addition, the DCCC Responses provide declarations from media consultants working on the advertisements in MURs 7179 and 7188, which aver that during 2016 these companies also performed work for HFA, but that the advertisements were not created, produced, or distributed at the suggest or request of HFA, that HFA had no involvement in the advertisements, and that that the media consultants did not use or convey any information about HFA campaign plans, projects, activities, or needs to create, produce, or distribute the advertisements in question. Joint Resp., Ex. C.

<sup>40</sup> CDP Resp., Palacio Decl.

<sup>41</sup> HFA Resp. at 1-2.

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